Editor's note: Appealed – dismissed, Civ. No. 79-56 (D.Ariz. Feb. 25, 1980)

UNITED STATES v. LOST POLACK MINING ASSOC.

IBLA 78-304 Decided November 20, 1978

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, declaring lode and placer mining claims null and void. A 9706.

Affirmed.

1. Mining Claims: Discovery: Generally

   The Government is entitled to determine whether a valuable mineral deposit exists on a mining claim, in order to decide whether to initiate a contest complaint challenging the validity of the claim, prior to the completion of mineral exploration by the mining claimant.

2. Mining Claims: Hearings--Rules of Practice: Hearings

   A second hearing will not be afforded where a mining claimant has submitted nothing which suggests that another hearing would produce a different result, i.e., a finding that a valuable mineral deposit has been discovered on a mining claim. Assertions that further mineral examination would prove the existence of such a deposit and that such a deposit exists on adjacent land, without more, do not entitle the claimant to another hearing.

APPEARANCES: Robert R. Brambley, Apache Junction, Arizona, for appellant; T. Adrian Pedron, Esq., Office of the General Counsel, Department of Agriculture, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Lost Polack Mining Association has appealed from a decision by Administrative Law Judge Harvey C. Sweitzer, dated January 30, 1978, declaring the Disconnected placer mining claims Nos. 1-4, and lode mining claims, Nos. 2 and 5-8, situated in the SW 1/4 sec. 19, T. 2 N., R. 7 E., Gila and Salt River meridian, Maricopa County, Arizona, null and void for lack of discovery of a valuable mineral deposit.

This proceeding was initiated by a contest complaint filed by the Bureau of Land Management, on behalf of the Forest Service, Department of Agriculture, which charged:

> a. A valid discovery as required by the mining laws of the United States does not exist within the limits of the Disconnected #'s 1, 2, 3 and 4 placer claims or the Disconnected #'s 2, 5, 6, 7 and 8 lode claims.
>
> b. The land embraced within the limits of the claims is nonmineral in character within the meaning of the mining laws.
>
> c. The claims are not marked on the ground so that the boundaries can be readily traced.

The administrative law judge held that the appellant had not proved that a valuable mineral deposit had been discovered on the subject claims thereby rebutting the Government's prima facie case of a lack of discovery and declared the claims null and void.

The judge's decision sets out a summary of the pertinent evidence and the applicable law as well as his findings and conclusions. We are in agreement with his decision and, therefore, adopt it as the decision of this Board. A copy of it is attached hereto.

[1] In his statement of reasons for appeal, appellant contends that the means used by the Government's mineral examiner to test for mineral deposits were not "correct," inasmuch as samples were taken prior to the initiation of the contest complaint and while the appellant was still "exploring" the claims. 1/

1/ A major source of contention throughout the proceedings below, and which has been argued before us, as well, is the effect of the Arizona State Office decision, dated November 8, 1976, which declared parts of the mining claims in issue to be null and void ab initio, since they were located after the effective appropriation of the land to Government use, under the principles set out at 44 L.D. 513. That decision contained the standard appeals paragraph. The Government contends that inasmuch as appellant did not file an appeal from this decision, those delineated parts of the mining claims are null and void as a matter of res judicata.

The Government, however, was not required to wait until appellant had discovered a valuable mineral deposit on the claims. Appellant's "exploring" might simply have disclosed that no valuable mineral deposit existed on the claims. Rather, the Government was entitled to determine the existence or nonexistence of a discovery on the claims so that it could properly decide whether to initiate a contest complaint challenging the validity of the claims.

Appellant advances other reasons why the Government's mineral examination was not "correct." The judge adequately disposed of these. Furthermore, we note that the opportunity was afforded appellant to choose the best spots for sampling, based on its knowledge of the claims (Tr. 33, 38, 81). Therefore, we cannot say that the Government's mineral examination was based on "improper sampling." 2/

Appellant also contends that it is entitled to another hearing so that it may present evidence taken from a "proper mineral examination" and evidence of "considerable and apparently profitable mining activity and production" in an adjacent area.

[2] A second hearing will not be afforded where nothing has been submitted which suggests that another hearing would be productive of a different result, i.e., a finding that a valuable mineral deposit has been discovered on a mining claim. United States v. Johnson, 33 IBLA 121 (1977); United States v. MacIver, 20 IBLA 352 (1975).

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fn. 1 (continued)

On the same date of this decision, however, the Arizona State Office filed a contest complaint against the subject claims. Paragraph four of the complaint recited that certain lands "were appropriated on May 22, 1975, under the principles of 44 L.D. 513 for construction of Spook Hills Flood Control Structure as shown on attached map." In its answer, which was timely filed, appellant denied, inter alia, the allegations contained in paragraph four of the contest complaint. Thus, it is appellant's contention that the issue of whether or not the portion of his claims within the Spook Hills Flood Control Structure are void ab initio is a matter which has not been finally decided. Because of our decision that, regardless of the status of the lands embraced by the flood control structure, the claims are not supported by a discovery, we need not resolve this issue.

2/ To the extent to which appellant objects to the sampling and assaying techniques utilized by the Government, and the reliance which Judge Sweitzer placed on the results thereof, the testimony of Gilbert J. Mathews, a mining engineer employed by the Forest Service, relating to the relative value of spectrographic analysis, wet analysis and fire assaying (Tr. 164-68), clearly supports the judge's decision to give more weight to the Government assay results than those submitted by appellant.

Appellant's implied assertion that further mineral examination would prove the existence of a discovery on the subject claims is speculative. It might simply confirm the finding by the Government's mineral examiner of a lack of discovery. Furthermore, proof that a valuable mineral deposit exists on an adjacent area, without more, is simply not probative of its existence on the subject claims. See United States v. Henault Mining Co., 73 I.D. 184 (1966), aff'd Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Meyers, 17 IBLA 313 (1974).

Appellant has submitted nothing which suggests that another hearing would produce a different result. Appellant had an opportunity at the previous hearing to develop evidence supporting its assertion of a discovery. The claims must stand or fall on the record of that hearing. United States v. Porter, 37 IBLA 313 (1978).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
James L. Burski
Administrative Judge

We concur:

_____
Joseph W. Goss
Administrative Judge

_____
Douglas E. Henriques
Administrative Judge

UNITED STATES OF AMERICA,	:	ARIZONA 9706
Contestant	:	Involving the Disconnected
	:	#'s 1, 2, 3 and 4 placer
v.	:	mining claims and Disconnected
	:	#'s 2, 5, 6, 7 and 8 lode mining
LOST POLACK MINING ASSOCIATION	:	claims situated in the SW1/4,
Contestee	:	Section 19, T. 2 N., R. 7 E.,
	:	GSR Mer., Mericopa County,
	:	Arizona, within the Tonto
	:	National Forest.

DECISION

Appearances: T. Adrian Pedron, Esq., Office of the General Counsel,
U. S. Department of Agriculture, Albuquerque, New Mexico,
for Contestant;

Robert R. Brambley, Apache Junction, Arizona, for Contestee.

Before: Administrative Law Judge Sweitzer.

The Bureau of Land Management, Department of the Interior, issued a complaint on behalf of the Forest Service, Department of Agriculture, pursuant to 43 CFR 4.451, contesting the validity of the captioned mining claims alleging, among other things, that the mining claims are invalid because a valid discovery as required by the mining laws of the United States does not exist within their limits. The claims were located under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 et seq. A timely answer generally denying the

charges of the complaint was filed on behalf of contestee. Hearing has been duly held and careful consideration given to the entire record in the case. Robert R. Brambley is agent for contestee and he appeared as its attorney-in-fact at the hearing.

Since 1872 the Federal mining laws have permitted citizens to explore, discover, and extract valuable minerals from the public domain and to secure fee title to lands containing such discoveries. Act of May 10, 1872, as amended, supra. Cameron v. United States, 252 U.S. 450,
460 (1920). Rights do not exist under mining claims unless a valuable mineral deposit has been discovered within the limits of each claim. Cole v. Ralph, 252 U.S. 286, 295 (1920). The test to apply is the "prudent man test," Chrisman v. Miller, 197 U.S. 313, 322 (1905), augmented by the marketability test, United States v. Coleman, 390 U.S. 599, 602-603 (1968). The combined tests require evidence of a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claim(s) could be marketed at a profit. Robert v. Morton, 549 F.2d 158 (10th Cir. 1976).

When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975).

A qualified mining geologist employed by the Forest Service testified that he made physical examinations of all the mining claims. He told of the location of pits and improvements on the claims and of holes drilled for the Bureau of Reclamation, illustrating his testimony with sketches and photographs. He was of the opinion no mineral production for purposes of sale had occurred on any of the claims.

The geologist took channel or chip samples from what he considered representative points on the claims he determined merited sampling. He had them assayed by Arizona Testing Laboratories, which he described as a reputable registered assayer. The assays, for gold, silver, nickel, cobalt, and mercury, showed "nil," "trace" or amounts so low that, according to the witness, no mineral of value for extraction was shown. (See Exhs. 8, 10, 12.) Consistent results were illustrated by qualitative spectographic analyses. (See Exh. 9, Tr. 24-25.) Tests of core samples

from holes drilled for the Bureau of Reclamation showed equally unpromising results. (Exhs. 14 through 20). The examiner responded in the negative as to the "prudent man test" (explained previously at p. 2).

Mr. Brambley testified on behalf of contestee. I find he is qualified to testify as an expert because he has performed work for other persons in mining ventures for about 28 years, although he has no formal education in mining or geology and has himself never actually developed a profitable mine. He introduced several spectographic and similar analyses from samples taken from the various claims. Certain of these tests show values of minerals, including gold and silver, of significantly higher quality (Exhs. B through G) than the results introduced by contestant. It was the essence of his testimony that these results showed sufficient mineralization "to keep us searching in that area." (Tr. 140, see also Tr. 111, 137, 142, 145-46, 156-58.) Contestee established it has caused some $15,000 to be expended on exploration or development of the claims.

Contestee showed the weight to be accorded the core samples should be reduced somewhat because the holes therefor were drilled to show the engineering or structural characteristics of the rock, and not for the purpose of mineral evaluation (Tr. 119-122; see Exhs. 16 through 19) and also because of the possibility of their being contaminated. (Tr. 126). Notwithstanding, I find these core samples and the analyses thereof are of some value in considering the question of discovery, particularly in that they are consistent with, and corroborate, the analyses of samples taken by contestant for the express purpose of mineral determination (see Tr. 59), and the views expressed based on examination of the claims by contestant's examining geologist. (See supra.)

The Government makes its prima facie case when a qualified mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Ramsey, 14 IBLA 152, 154 (1974); United States v. Bloomquist, 7 IBLA 351 (1972). The mineral examiner's conclusion must be based on reliable, probative evidence. United States v. Winters, 78 I.D. 193, 195 (1971). But the examiner is not required to perform discovery work to explore or sample beyond the claimants' workings or to conduct drilling programs for the benefit of the claimants. United States v. Grigg, 79 I.D. 682, 688 (1972). In consideration of the foregoing, I find that contestant established a prima facie case of no discovery on each of the contested claims.

The results of analyses submitted by contestee at first blush appear somewhat impressive, but I find their significance to be extremely limited for the following reasons:

1. There is no showing that they actually represent minerals of value which could be recovered at a profit.

2. There is no showing that any mineral of such quality exists in any significant quantity.

3. The analyses were shown to be less reliable in nature than were those submitted by contestant. (Tr. 163-66).

A few reports indicating some mineral values are not substantial evidence of a discovery where there is not adequate evaluation and other corroborative and probative evidence of a continuity of mineralization in sufficient quantity and quality to meet the prudent man test of discovery of a valuable mineral deposit. United States v. Ramsher Min. & Eng. Company. Inc., 13 IBLA 268 (1973).

The evidence in this case might well warrant further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify the actual working of the claims or any of them, but this does not suffice to establish a discovery of a valuable mineral deposit. Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit; that is, a valuable mineral deposit has not been found simply because the facts might warrant a continued search for such a deposit. United States v. McClurg, 31 IBLA 8, 11 (1977); United States v. Taylor, 25 IBLA 21, 25 (1976). This is the most that contestee's evidence has established. The fact that contestee has expended a substantial sum in this exploration endeavor does not alter this finding.

A prima facie case of no discovery having been made, and contestee having failed to establish the existence of a discovery on any of the claims by a preponderance of the evidence, a conclusion that all the contested mining claims are invalid is required. Cf. United States v. Patee, A-28731 (May 7, 1962). This conclusion renders discussion of the other issues unnecessary. See United States v. Anderson, 15 IBLA 123, 125 (1974); United States v. Jones, 2 IBLA 237 (1971).

Therefore, following consideration of the entire record in the case, pursuant to the prayer of the complaint, each of the captioned mining claims is declared null and void for the reason that no valuable mineral deposit has been discovered within the limits of any of such claims.

Harvey C. Sweitzer
Administrative Law Judge

APPEAL INFORMATION

The contestee, as the party adversely affected by this decision, has the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in Title 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken, the adverse party, the contestant, can be served by service upon the Office of the General Counsel at the address listed below.

Enclosure: Information Pertaining to Appeals Procedures.

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